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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540 31

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

G. LYLE JONES,
GEO. H. WARD,
GILMER A. JONES,
RICHARD S. JONES.
Counsel for Petitioner.

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STATUTES

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices:

Dr. Furman Angel prays for a writ of certiorari to review a judgment of United States Circuit Court of Appeals for the Fourth Circuit entered July 19, 1945, in this cause, affirming a judgment of the District Court of the United States for the Western District of North Carolina, at Asheville. The opinion of the Court of Appeals appears in 150 Fed. (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 34). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347.

Questions Presented

(1) Can respondent, who had taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in purchase money mortgage or deed of trust executed after the enactment of the statute?

(2) Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort, upon appeal, having adjudged that the State Court by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statutes Involved

The Appendix infra (P. 7) contains the applicable Statute, Chapter 36 Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

On the 4th day of March, 1940, respondent, W. H. Bullington, a citizen and resident of the State of Virginia,

entered into a written contract with petitioner, Dr. Furman Angel, a citizen and resident of the State of North Carolina, by the terms of which he contracted to sell, and petitioner contracted to purchase, certain real estate located in the County of Roanoke, State of Virginia, for the price of $11,000.00 (R. 16). This contract was consummated on the 5th day of March, 1940 (R. 17), at which time respondent executed to petitioner a warranty deed conveying title. Upon delivery of the deed $500.00 cash was paid, and petitioner executed sixteen interest bearing negotiable notes aggregating $3,100.00 (R. 17). These purchase money notes were secured by deed of trust on the property. In addition to the cash payment and deferred payments due respondent, and as a part of the purchase price, petitioner assumed an F. H. A. loan in the amount of $7,400.00 (R. 19). He defaulted in the payment of the purchase money notes and thereafter, on the 29th day of May, 1940, the trustees sold the property, respondent becoming the purchaser for the sum of $25.00, subject to the $7,400.00 deed of trust above mentioned.

Subsequent to the foreclosure proceedings respondent instituted suit against petitioner in a Superior Court of North Carolina, seeking to recover a deficiency judgment (R. 21). Petitioner filed demurrer to the complaint setting forth, among other things, that no cause of action was alleged in the complaint for that the complaint showed upon its face that respondent was attempting to obtain judgment for the balance of the purchase price of certain real estate after foreclosure of the deed of trust. The demurrer was based upon the ground that the State of North Carolina had enacted Chapter 36 of the Public Laws of 1933, G. S. of North Carolina 1943, Section 45-36 (R. 21), establishing it to be the public policy of the State that a deficiency judgment should not be granted on purchase money notes

executed and secured by mortgage or deed of trust on real property, after the property had been sold under the mortgage or deed of trust. Respondent insisted that the act impaired the obligation of his contract and divested him of his rights in the case, and for that reason was invalid and of no effect.

The trial judge overruled the demurrer and petitioner appealed to the Supreme Court of North Carolina. The appeal was heard by said Court, which is the highest court of the State, at the Fall Term, 1941. The opinion of the Court is set forth in Volume 220, North Carolina Reports, Page 18. That Court held that the State Court had no authority to try the cause, and hence respondent could not maintain his action. There was no appeal or other action taken to have the judgment of that court reviewed by this court.

The present action was instituted in the United States District Court for the Western District of North Carolina. Petitioner filed answer to respondent's complaint, denying the right of respondent to recover and specifically plead the North Carolina Statute, Chapter 36 of the Public Laws of 1933, G. S. of North Carolina 1943, Section 45-36, and the prior action in the State Court, insisting that respondent was estopped by an unappealed judgment from prosecuting this action (R. 14). The cause was heard in the District Court upon an agreed statement of facts (R. 16). That Court held that respondent could maintain the action, and entered judgment accordingly (R. 23). The Circuit Court of Appeals affirmed the lower court (R. 30).

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the

North Carolina Statute establishing it to be the public policy of the State that deficiency judgments could not be granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Reasons Relied Upon for Allowance of the Writ

The Court below erroneously decided that respondent could maintain his action for deficiency judgment on notes given for purchase money of property in Virginia after the property had been foreclosed under deed of trust without regard to the State Statute (R. 11, 20), prohibiting judgments in such cases.

The decision below is in conflict with the principle established in *Erie* v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, and the recent opinion of this Court in *Guaranty Trust Company* v. *Grace W. York*, decided June 18, 1945, and reported in United States Supreme Court Reports, 89 L. Ed. 1418. There it was held that a Federal Court "can not afford recovery if the right to recover is made unavailable by the State." Therefore, after it was judicially determined by the State Court that it had no jurisdiction to try the cause, the respondent could not maintain the action in the Federal Court.

The Court erred in holding that respondent is not precluded from maintaining an action in the Federal Court for the reason that it has been judicially determined by a judgment of the State Court, which has not been reversed, that he, by reason of the North Carolina Statute, could not recover in that Court (R. 31) 200 N. C. 18.

Conclusion

For these reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

G. Lyle Jones,
Geo. H. Ward,
Gilmer A. Jones,
Richard S. Jones,
Counsel for Petitioner.

APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"Deficiency Judgments Abolished Where Mortgage Represents Part of Purchase Price.—

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate; Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 540

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 24) is not printed in the published reports.

The Opinion of the Circuit Court of Appeals (R. 30) is reported in 150 Federal (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 34). The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 28 U. S. C. A. 347.

Questions Presented

1. Can respondent, who has taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in a purchase money mortgage or deed of trust executed after the enactment of the Statute?

2. Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort upon appeal having adjudged that the State Court, by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statute Involved

The Appendix Infra (p. 16), contains the applicable Statute, Chapter 36, Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

There are no controverted issues of fact in this case. The parties entered into a stipulation agreeing upon the facts (R. 16). The facts were that petitioner purchased some real estate in Roanoke County, Virginia, paying a part of the purchase price and executing purchase money notes

secured by deed of trust for the deferred payments. Only one payment was made, the initial payment. When default was made in the payment of the first note the property was foreclosed under the deed of trust, and respondent purchased it, subject to certain outstanding indebtedness, for the sum of $25.00. He prosecuted an action in the State Court in North Carolina for deficiency judgment. The State Court denied recovery on the ground that the State Statute prohibiting deficiency judgments (R. 31) took from it jurisdiction of the case, and the right to entertain the action. Respondent then instituted the present action, which was heard upon an agreed statment of facts, and recovery was allowed. The judgment of the lower court was affirmed by the Circuit Court of Appeals.

Petitioner takes the position that the Statute is not invalid for that (a) a remedy was left to respondent whereby he could have instituted suit on his notes before foreclosure; (b) that regardless of whether a remedy was left, the Act was effectual and applied to the Federal Court; and (c) since respondent had elected to institute his action first in the State Court, and a judgment by the highest Court in the State was entered, adjudging that the State Court had no jurisdiction to entertain the action, and respondent took no appeal or other appropriate action to have the judgment reviewed by this Court, that the judgment constituted res judicata and respondent was, therefore, estopped to maintain this action.

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the North Carolina Statute establishing it to be the public policy of the State that deficiency judgments could not be

granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default, and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Argument

The State of North Carolina in 1933 enacted the Statute in question for the purpose of establishing the public policy of the State with regard to deficiency judgments.

If the Statute was valid for the purposes enacted, it was binding on both the State and Federal Courts. *Erie Railway Co.* v. *Thompkins,* 304 U. S. 63, 82 L. Ed. 1188; *Guaranty Trust Co.* v. *York,* 89 L. Ed. 1418.

On the contrary, if it was not valid, its provisions were binding on neither the State nor the Federal Courts.

If it was not valid and there was a properly constituted State Court of competent jurisdiction to hear and determine matters of the nature in question, the State could not refuse jurisdiction to the Court to try actions involving the rights of non-residents.

The law is settled by this Court that a State Court can not escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction to Courts, otherwise competent. The full faith and credit clause requires the State Court, unless it is against the declared public policy of the State, to take jurisdiction of an action when its Courts have general jurisdiction of the subject matter and the parties. *Kennedy* v. *Supreme Lodge,* 252 U. S. 411, 64 L. Ed. 638; *Broderick* v. *Rosner,* 294 U. S. 629, 79 L. Ed. 1100; *McKnett* v. *St. L. & S. F. Ry. Co.,* 292 U. S. 230, 78 L. Ed. 1227.

And, the Federal District Courts, in cases which come within the statutory requirement as to diversity of citizenship, have equal jurisdiction with State Courts to try such causes.

If the act was invalid in that its effect was to impair the obligation of a contract, as respondent has at all times and in all Courts contended it was, the State Court could not refuse to try the cause, and the judgment of the highest Court of the State, as entered, was an erroneous judgment of a Court of competent jurisdiction, but one binding on all parties until reversed by this Court. *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 68 L. Ed. 362.

Hence, a cause of action involving the same matter between the same parties, can not be maintained in the Federal District Court so long as such State judgment is undisturbed.

The State Court adjudged that the Statute was valid in so far as it related to the State Court, and the Circuit Court of Appeals in its opinion (R. 32) held that the interpretation of the Statute by the State Court was binding on the Federal Court.

This constitutes a conclusive adjudication that the Act is binding in so far as it relates to State Courts. We think this answers the question that the action can not be maintained in the Federal Court for the reason that since it has been judicially determined by a Court of competent jurisdiction that the State Court does not have jurisdiction to try the causes, the Federal Court, under the authority of *Erie R. R.* v. *Thompkins*, and *Trust Company* v. *York*, *supra*, is likewise without authority to maintain the action.

Petitioner submits that there is another reason why the statute is not invalid. It will be noted that the statute precludes the obtaining of deficiency judgments *after foreclo-*

sure of mortgages and deeds of trust securing purchase money notes on real estate.

The Courts of North Carolina and the Federal District Court were open to respondent to proceed against petitioner on his notes before foreclosure was had. He, therefore, had a remedy left to him which he could have pursued if he had followed that course rather than foreclosed first.

> "If a particular form of proceeding is prohibited, and another is left, or is provided, which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired."

Tennessee v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610; See also: *Newark Savings Institute* v. *Furman*, 33 N. J. Equity 436; *Parker Brothers* v. *Fagan*, 68 Fed. (2) 616; *Page* v. *Ford*, 65 Oregon 450, 45 L. R. A. (N. S.) 247, 131 Pacific 1013.

The Circuit Court of Appeals in its opinion (R. 30), while holding that the interpretation of the Statute, as construed by the State Court, was binding on that Court, held that respondent could maintain his action in the Federal Court, on the ground that a State Statute could not limit or take away the jurisdiction of the Federal District Court. In support of this position the Court cited four cases, namely: *Suydan* v. *Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Union Bank* v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472; *Railway Co.* v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571; *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

In the *Suydan* case a New York plaintiff sued an administrator in Alabama on a note dated and payable in New York. The act of the Assembly of Alabama provided that the estate of a deceased person which is declared to be insolvent should be distributed by the executors or administrators according to the provisions of the Statute, among creditors, and that no suit or action should be commenced or sustained against any executor or administrator after

the estate of the deceased had been represented as insolvent except in certain cases, not of the description of that on which the suit was brought. This Court held that the constitutional and legal rights of a citizen of the United States to sue in the Courts of the United States would not permit the suit of the plaintiff to be abated simply upon a judicial decision of the insolvency of the estate.

To the same effect is the case of *Union Bank* v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472.

The case of *Railway Co.* v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571, involved the validity of a Statute of Wisconsin permitting damages in death cases, with the proviso that the action should be brought for a death caused in that State in some court established by the constitution and laws of that State. This Court held that the proviso was unconstitutional as a State has no authority to give its courts exclusive jurisdiction over the Federal Courts when the Federal Courts otherwise would have jurisdiction.

The case of *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, involved the construction of a New York Statute which carried a provision to the effect that no foreign corporation doing business in New York should maintain any action in that State upon any contract made by it *in the State* unless it had secured a certificate showing its compliance with the requirements of the Statute. The Court of Appeals of the State of New York had construed the Statute as not rendering absolutely void contracts made by non-complying corporations. This Court held that since the New York Court had construed the Statute to hold that contracts made by corporations under such circumstances were not void, but that the only penalty against corporations which violated the statutory provisions, and did business in the State without domestication, was the loss of the privilege of maintaining a suit in the State Courts, that that did not deprive the cor-

poration of the right to maintain the action in the Federal Court.

The object of the Statute was to penalize foreign corporations for doing business in the State without complying with the domestication Statute. The suit did not involve any question of the right of an outsider, who was not engaged in transacting business within the State, to come into the State and maintain an action under the full faith and credit clause of the United States Constitution, as in the instant case. There the contract was made in New York,—the misconduct of transacting business without domestication was within the State and the suit was instituted in the Federal Court in the State. Under such facts it was held that the State Court could withhold from such party the use of its courts.

Regardless, however, of the holdings of the Court in those cases, we think the question is put at rest by the recent cases of *Erie Railway* v. *Thompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *Grace W. York*, 89 L. Ed. 1418.

It has been judicially determined that an action can not be maintained in the State Court, and since the Federal Court, under the decisions last above referred to, is without jurisdiction when jurisdiction is taken from the State Courts, the Circuit Court of Appeals, we submit, was in error, and its judgment should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"Deficiency Judgments Abolished Where Mortgage Represents Part of Purchase Price"

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, said evidence of indebtedness shows upon the face that it is for balance of purchase money for real estate; Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."